

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

LESLIE A. M.,

Plaintiff,

v.

Civil Action No.
5:23-CV-375 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

AMDURSKY, PELKY LAW FIRM
26 East Oneida Street
Oswego, NY 13126

AMY CHADWICK, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
6401 Security Boulevard
Baltimore, MD 21235

FERGUS KAISER, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.¹ Oral argument was conducted in connection with those motions on April 16, 2024, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:


- 1) Plaintiff’s motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner’s determination that plaintiff was not

¹ This action is timely, and the Commissioner does not argue otherwise. It has been treated in accordance with the procedures set forth in the Supplemental Social Security Rules and General Order No. 18. Under those provisions, the court considers the action procedurally as if cross-motions for judgment on the pleadings have been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.



David E. Peebles
U.S. Magistrate Judge

Dated: April 22, 2024
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
LESLIE M.,

Plaintiff,

-v-

5:23-CV-375

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
-----x

DECISION TRANSCRIPT
BEFORE THE HONORABLE DAVID E. PEEBLES

April 16, 2024
100 South Clinton Street, Syracuse, NY 13261

For the Plaintiff:

AMDURSKY, PELKY LAW FIRM
26 East Oneida Street
Oswego, New York 13126
BY: **AMY CHADWICK, ESQ.**

For the Defendant:

SOCIAL SECURITY ADMINISTRATION
26 Federal Plaza
Room 3904
New York, New York 10278
BY: **FERGUS J. KAISER, ESQ.**

Hannah F. Cavanaugh, RPR, CRR, CSR, NYACR, NYRCR
Official United States Court Reporter
100 South Clinton Street
Syracuse, New York 13261-7367
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1 (The Court and all parties present by telephone.
2 Time noted: 11:26 a.m.)

3 THE COURT: All right. Let me begin by commending
4 counsel for excellent and spirited oral argument. You've
5 addressed all of the issues and squarely presented the instances
6 in which you disagree between yourselves.

7 Before I give you my decision, the issue of consent
8 was raised. I pointed out to the parties that the consent form
9 that was signed by plaintiff's counsel -- we have a blanket
10 consent from the Commissioner of Social Security to a magistrate
11 judge deciding cases on consent. Plaintiff's counsel indicated
12 that she consents to me, notwithstanding that the original form
13 was for Judge Dancks to decide the case.

14 I have before me a challenge to a Commissioner's
15 determination pursuant to 42, United States Code, Section
16 405(g).

17 The background is as follows: Plaintiff was born in
18 December of 1969. She is currently 54 years of age. She was
19 between 49 and about 52 during the relevant period in this case.
20 Plaintiff is married. She lives with her husband and a
21 30-year-old son in Fulton, New York. She stands 5'5" in height
22 and at various times weighed 180 pounds, but she lost weight and
23 was down to 164 pounds more recently. At one time she was
24 considered obese, but I think she has fallen out of that
25 category based on her weight loss. Plaintiff has an 11th grade

1 education and did secure a GED. While in school, she attended
2 regular classes. Plaintiff has a driver's license, but
3 testified that she stopped driving in March of 2021. Plaintiff
4 is left-handed.

5 Plaintiff stopped working in August of 2016. While
6 employed, she worked as a factory worker, a machine operator.
7 She worked in an office job where she was an assistant, and that
8 was after surgery, and she was also an administrative clerk.

9 Physically, plaintiff suffers from back pain, neck
10 pain, hip pain radiating into her legs, fibromyalgia, and
11 migraines. She suffered a Workers' Compensation injury of her
12 neck and lumbar area in 2010. She underwent an anterior
13 cervical discectomy at level C4, 5, 6, and 7 in November of
14 2012. That appears at page 371 of the Administrative
15 Transcript. She has since undergone some injections to control
16 pain and had a spinal cord stimulator implanted in November of
17 2020. That's at 916. It was turned off in August of 2021
18 because it was causing problems, including, I guess, spasms.

19 Mentally, plaintiff does not suffer from any
20 significant mental condition. She is being treated for some
21 mild depression associated primarily with her pain by her
22 primary physician. She takes Cymbalta and Wellbutrin for
23 depression. Her mental condition does not appear to be at issue
24 in this case.

25 Plaintiff has received treatment from Oswego Health,

1 Dr. Michael Diaz, from May of 2020 forward for orthopedic
2 issues. And her primary physician is Dr. Douglas Guenter, and
3 she has seen Dr. Guenter of Oswego Family Physicians since
4 September of 2010. She has also received treatment from Upstate
5 Comprehensive Pain Management.

6 In terms of activities of daily living, plaintiff is
7 able to shower, dress, groom. She does some cooking, some
8 shopping. She's able to sit outside, watch television, listen
9 to the radio, and she does some cleaning.

10 Procedurally, plaintiff applied for Title II benefits
11 on June 15, 2020, alleging disability based on fibromyalgia;
12 cervical discectomy with fusion and plating, C4 through 7;
13 osteoarthritis; thoracic and lumbar spinal stenosis; multiple
14 disc herniations; degenerative disc disease; migraines; severe
15 depression; chronic pain; and plantar fasciitis.

16 Prior applications were filed and denied on March 10,
17 2017, that resulted in an unfavorable ALJ decision on
18 January 22, 2019, and denial of plaintiff's application for
19 review by the Social Security Administration Appeals Council.
20 The Administrative Law Judge in this case found no basis to
21 re-open that prior application.

22 A hearing was conducted to address the most recent
23 filing on November 29, 2021, by Administrative Law Judge
24 Elizabeth Koennecke. A second hearing was conducted on March 2,
25 2022, during which testimony from a vocational expert was

1 elicited. ALJ Koennecke issued an unfavorable decision on
2 March 14, 2022. That became a final determination of the
3 Commissioner on February 9, 2023, when the Social Security
4 Administration Appeals Council denied plaintiff's request for a
5 review. This action was commenced on March 24, 2023, and is
6 timely.

7 In her decision, ALJ Koennecke applied the familiar
8 five-step sequential test for determining disability. She first
9 noted that plaintiff's last insured status was December 31,
10 2021, and therefore identified the relevant period as
11 January 23, 2019, through December 31, 2021.

12 At step one, she found plaintiff had not engaged in
13 substantial gainful activity since January 23, 2019.

14 At step two, she found that plaintiff suffers from
15 degenerative disc disease of the cervical and lumbar spine and
16 osteoarthritis of the hips and fibromyalgia, constituting severe
17 impairments that impose more than minimal limitations on
18 plaintiff's ability to perform basic work functions. She found
19 that plaintiff no longer meets the definition of obese and she
20 rejected plantar fascial fibromatosis, migraines, thoracic spine
21 issues, hand issues, and the mental health issues alleged. She
22 did note, however, that notwithstanding her finding at step two,
23 she did consider all of plaintiff's medically determinable
24 impairments when analyzing her ability to perform work
25 functions.

1 At step three, ALJ Koennecke concluded that plaintiff
2 is unable to meet or medically equal any of the listed
3 presumptively disabling conditions set forth in the
4 Commissioner's regulations, specifically considering listings
5 1.15, 1.16, and 1.18. ALJ Koennecke next determined that
6 plaintiff retains the residual functional capacity to perform
7 sedentary work, except she could only occasionally climb ramps,
8 stairs, ladders, ropes, and scaffolds, balance, stoop, kneel,
9 crouch, and crawl.

10 Applying that RFC, and with the aid of a vocational
11 expert, plaintiff was determined unable to perform her past
12 relevant work, which were characterized as material handler,
13 extruder operator, administrative clerk, and file clerk.

14 At step five, the Administrative Law Judge determined
15 that plaintiff does have work skills that are transferrable, and
16 in accordance with the testimony of the vocational expert,
17 determined that plaintiff is able to perform available work in
18 the national economy, citing as representative positions those
19 of appointments clerk, routing clerk, and receptionist. She
20 noted, also, that even if you added a sit/stand option to the
21 residual functional capacity, those jobs would still be
22 available.

23 The Court's function in this case, as you know, is
24 limited, the standard that I apply is extremely deferential, and
25 I must determine whether correct legal principles were applied,

1 and the resulting determination is supported by substantial
2 evidence.

3 Plaintiff's contentions in this case are multiple.
4 She challenges the step five determination based on the
5 vocational expert's testimony, claiming that there are no
6 transferrable skills possessed by the plaintiff and therefore
7 based on the Medical-Vocational Guidelines, when she turned 50,
8 the grids, or Medical-Vocational Guidelines, would dictate a
9 finding of disability.

10 She challenges the step two determination and the
11 finding that plaintiff's thoracic impairment and SI joint
12 dysfunction -- well, the thoracic impairment was not severe and
13 the SI joint dysfunction was not at all addressed by the
14 Administrative Law Judge.

15 Thirdly, she challenges the evaluation of the medical
16 evidence of record, and specifically the finding that Dr.
17 Lorensen's opinion was persuasive and Dr. Guenter's was not,
18 arguing that there was insufficient explanation and no
19 compliance with the medical guidelines.

20 The fourth contention is that the RFC is unsupported
21 because it did not include a sit/stand option and a reaching
22 limitation, the latter pursuant to Dr. Lorensen's opinion. I'll
23 first address step five. The Administrative Law Judge relied on
24 the testimony of a vocational expert. The vocational expert
25 testified, I believe at page 77 of the Administrative

1 Transcript, that plaintiff does possess transferrable skills.
2 In my view, the Administrative Law Judge was entitled to rely on
3 that testimony and reject the argument of no transferability and
4 the plaintiff's reliance on the grids, or Medical-Vocational
5 Guidelines.

6 Step two, I'll note that there is some indication
7 that there are issues with both plaintiff's thoracic spine and
8 SI joint dysfunction, the latter of which was not addressed at
9 all, however, it's plaintiff's burden to establish limitations
10 through step four, and the mere presence of an impairment does
11 not necessarily translate to additional limitations that were
12 not included in the RFC. In this case, I think the step two
13 determination is supported by substantial evidence, but let's
14 assume that it is not, any error in that regard would be
15 harmless because there were severe limitations found, the
16 Administrative Law Judge did proceed through the five-step
17 sequential analysis, and specifically stated that she considered
18 all medically determinable impairments whether or not she found
19 them severe. So in my view, that would be harmless.

20 I have a little bit more of a problem with the
21 residual functional capacity finding. It does not include any
22 limitation on reaching. Reaching is a nonexertional impairment
23 that must be considered under 20 C.F.R. Section
24 404.1569a(c)(vi). The Administrative Law Judge found that Dr.
25 Lorensen's medical source statement was persuasive. It includes

1 moderate limitation for reaching. That's at page 701 of the
2 Administrative Transcript. The Administrative Law Judge
3 analyzes that opinion at the bottom of 24 and the top of 25.
4 She notes Dr. Lorensen's moderate limitation opinion concerning
5 reaching, finds the opinion persuasive, and does not indicate
6 why she did not include that in either the RFC or the
7 hypothetical posed to the vocational expert.

8 As the Court found in *Rowe v. Colvin*, 166 F. Supp. 3d
9 234 from May 12, 2016, quote, "a hearing officer properly must
10 incorporate non-exertional impairments - which include
11 'difficulty performing the manipulative or postural functions of
12 some work such as reaching, handling, stooping, climbing,
13 crawling, or crouching.'" In that case, Judge William Young,
14 sitting in this court by designation, noted that when a hearing
15 officer fails to explain discrepancies between the adoption of a
16 consultative examination opinion and the RFC, it must be
17 explained. The failure to explain constitutes a basis to
18 remand.

19 I know that the Commissioner has argued that moderate
20 limitations in reaching are not inconsistent with sedentary
21 work, however, the cases cited involved light work. The
22 sedentary work is defined by regulation as follows: "Sedentary
23 work involves lifting no more than ten pounds at a time and
24 occasionally lifting or carrying articles like docket files,
25 ledgers, and small tools. Although a sedentary job is defined

1 as one which involves sitting, a certain amount of walking and
2 standing is often necessary in carrying out job duties. Jobs
3 are sedentary if walking and standing are required occasionally
4 and other sedentary criteria were met," 20 C.F.R. Section
5 404.1567(a). And subsequent rulings have clarified that
6 sedentary work generally involves periods of standing or walking
7 for no more than about two hours of an eight-hour workday and
8 sitting up to a total of approximately six hours in a similar
9 period, SSR 96-9p. So, as you can see, the definition of
10 sedentary work does not speak to reaching.

11 I find that there was a duty to explain. There's no
12 explanations for not reaching. Dr. Gallagher and
13 Dr. Naroditsky, the two state agency consultants, did not
14 address reaching one way or the other. And notwithstanding the
15 argument raised by the Commissioner, I'm not sure that a
16 moderate limitation in reaching is consistent with the three
17 positions, for example, that were cited by the vocational
18 expert.

19 This Court, District Judge Suddaby, found in *Peterson*
20 *v. Astrue*, 2 F. Supp. 3d 223, from September 25, 2012, Northern
21 District of New York, concluded that an opinion of moderate
22 limitation for reaching is at odds with the conclusion that
23 plaintiff retains the RFC to perform sedentary work.

24 It was similarly noted by Magistrate Judge Andrew T.
25 Baxter of this court in *Robert S. v. Commissioner of Social*

1 *Security*, 2019 WL 4463497, from September 18, 2019, in footnote
2 six, there was a conclusion that moderate limitation for
3 reaching does not support an ALJ's conclusion that plaintiff
4 retains the RFC to perform sedentary work.

5 And I note that the Dictionary of Occupational Titles
6 for entry for all three positions, appointment
7 clerk/237.367-010, routing clerk/249.367-070, and
8 receptionist/237.367-038, all note that those positions require
9 frequent reaching which is defined as one-third to two-thirds of
10 the time.

11 So in my view, moderate limitation for reaching
12 should have been included in the RFC and should have been
13 presented to the vocational expert who might have testified, as
14 the Commissioner now argues, that a moderate limitation in
15 reaching does not preclude plaintiff from performing the three
16 positions identified, but I think that that needs to be fleshed
17 out with a vocational expert rather than a lay opinion, so I
18 find that to be an error and a basis to remand.

19 I also find error in the analysis of the medical
20 opinions of record, and in particular, the rejection of
21 Dr. Douglas Guenter's medical source statement from December 16,
22 2021, which appears at 1193 through 1195 of the Administrative
23 Transcript. It is wholly inconsistent with plaintiff's ability
24 to perform sedentary work. It provides that plaintiff can only
25 sit, stand, and walk less than two hours in an eight-hour

1 workday, she would require unscheduled breaks every half hour
2 for five to ten minutes, she can rarely reach, including
3 overhead, she'd be absent more than four days per month.

4 The Administrative Law Judge rejected that opinion of
5 a longtime treating source by simply stating, "the undersigned
6 notes that the purpose of this visit" -- this is when the form
7 was prepared -- "was to have paperwork completed at the request
8 of the representative after the hearing had already been
9 conducted. No exam was performed, no testing was done, the
10 questions were just completed. For these reasons, the
11 undersigned does not find this assessment persuasive." I find
12 that explanation wholly unsatisfactory. This is someone who has
13 been a primary physician to the plaintiff since September 1,
14 2010. That's at 300. Prior to the date in question when the
15 form was prepared, according to my review of the records,
16 plaintiff had 14 visits during the relevant period with Dr.
17 Guenter and underwent multiple X-rays and MRIs.

18 The Commissioner makes a facially appealing argument
19 for why Dr. Guenter's opinion is not persuasive and not
20 consistent with the records, but that's post hoc reasoning. We
21 have no idea whether the Administrative Law Judge in this case
22 compared the opinion of Dr. Guenter to his treatment records
23 over that period and since September 1, 2010. I know that the
24 regulations that took effect in March of 2017 abrogated the
25 treating source rule, but cases since then emphasize that it is

1 still important to consider the opinion of an ongoing treating
2 source who has had historical knowledge of the plaintiff's
3 condition, so I also find error in the ALJ's treatment of Dr.
4 Guenter's medical source statement and believe the matter should
5 be remanded for a further fuller evaluation of the consistency
6 and supportability of that opinion.

7 So for these two reasons, I find that the resulting
8 determination is not supported by substantial evidence and was
9 not the product of correct legal principles and will grant
10 judgment on the pleadings to the plaintiff, order that the
11 Commissioner's determination be vacated, and that the matter be
12 remanded. I'll issue a short form order and attach the
13 transcript of this decision to it shortly.

14 Again, thank you, both, for excellent presentations
15 and I hope you have a wonderful day.

16 THE COURTROOM DEPUTY: Court is adjourned.

17 (Time noted: 11:51 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR, Official U.S. Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 16th day of April, 2024.

s/ Hannah F. Cavanaugh

HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR
Official U.S. Court Reporter